STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 10, 2007
v	No. 267971 Clinton Circuit Court
ALPHONSO HERNANDEZ-ORTA, Defendant-Appellant.	LC No. 95-005901-FH

Before: Meter, P.J., and Kelly and Fort Hood, JJ.

PER CURIAM.

Defendant appeals by delayed leave granted from the trial court's order denying his motion for biological testing. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

On October 8, 1994, the victim was invited to drink beer and smoke marijuana with her friend named Arthur. The victim had met defendant before that date, but did not know his actual name. She had heard defendant referred to as "Fonzie." The victim, Arthur, and defendant traveled to different stores where beer was purchased, then drove to a location near the woods. They proceeded to go to immigrant worker housing to use the bathroom. The victim was in a stall in the women's bathroom. Defendant entered the bathroom and when the victim came out of the stall, defendant attempted to place the victim's hands down his pants. The victim told defendant to leave her alone. When they returned to the car, defendant tried to pull the victim's pants down. The victim asked Arthur to stay with her because she was scared of defendant. The three returned to town, and defendant got out of the car. Arthur left the victim in the car. Defendant returned to the car and drove off with the victim in the backseat. The victim testified that defendant returned to the woods where he sexually assaulted her.

The victim reported the sexual assault and was taken to the hospital where deoxyribonucleic acid (DNA) samples were recovered. At the time of trial, the technology available indicated that defendant was within the population that could have left such a sample on the victim. However, the victim also admitted that she had engaged in sexual intercourse with another individual shortly before the rape. A medical doctor also indicated that DNA evidence from sexual intercourse could be present for 72 hours after sexual activity. The first trial ended in a hung jury. Prior to the second trial, the trial court determined that the DNA was not relevant and excluded the evidence. Defendant was convicted of first-degree criminal sexual conduct, MCL 750.520b(1)(f), and was sentenced to ten to twenty years' imprisonment.

Defendant appealed his conviction as of right, and a panel of this Court affirmed his conviction. With regard to the challenge to the exclusion of the DNA evidence, this Court held:

> Defendant first argues the trial court abused its discretion when it excluded from evidence a DNA report prepared for the prosecution by LapCorp. The report set forth the results of the comparison DNA tests done on defendant's blood, the victim's blood, and vaginal samples taken from the victim after the rape. "The decision whether to admit evidence rests within the sound discretion of the trial court and will not be set aside on appeal absent an abuse of discretion." *People v Long Realty, Inc*, 199 Mich App 461, 466; 502 NW2d 337 (1993). "An abuse of discretion exists when the court's decision is so grossly violative of fact and logic that it evidences perversity of will, defiance of judgment, and the exercise of passion or bias." *People v Ullah*, 216 Mich App 669, 673; 550 NW2d 568 (1996).
>
> The DNA testing method used on the genetic samples was the polymerase chain reaction ("PCR") method. In *People v Lee*, 212 Mich App 228, 282-283; 537 NW2d 233 (1995), this Court held "that trial courts in Michigan may take judicial notice of the reliability of … the PCR method." However, even though the PCR method is acknowledged as credible and reliable, that does not mean results obtained pursuant to PCR testing must be entered into evidence. As with all evidence, PCR test results must be relevant in order to be admitted into evidence at trial. The report indicated defendant's DNA was not detected in the nonsperm vaginal sample, and that results obtained from the sperm sample failed "to meet reporting standards." Because these results are at best equivocal, the report does not "make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence." MRE 401. Therefore, the trial court did not abuse its discretion when excluding the report from evidence.
>
> Defendant's second argument also centers on the excluded report. Defendant asserts his constitutionally protected right to compulsory process was violated when the trial court denied his motion for funds to conduct a telephonic deposition of his forensic expert who prepared the report. On appeal, the trial court's ruling on defendant's request for the funds is reviewed for an abuse of discretion. See *In re Klevorn*, 185 Mich App 672, 678; 463 NW2d 175 (1990).
>
> In *People v Loyer*, 169 Mich App 105, 112-113; 425 NW2d 714 (1988), a panel of this Court observed that both the United States and Michigan Constitutions guarantee the right of compulsory process to a defendant in a criminal prosecution. "However," it noted, "a criminal defendant's right to compulsory process is not absolute." *Id*. at 112. Defendant needed to establish to the satisfaction of the trial court that the witness he wanted to depose was a material witness without whose testimony defendant could not safely proceed. MCL 775.15; MSA 28.1252. Defendant failed to meet this burden. When excluding the DNA report prepared by defendant's expert, the trial court also excluded any and all evidence related to semen testing done by the prosecution. Thus, any potential prejudice to defendant was eliminated. The exclusion of all

> evidence related to DNA testing assured that defendant could safely proceed to trial without the telephonic deposition. [*People v Hernandez-Orta*, unpublished opinion per curiam of the Court of Appeals, issued August 22, 1997 (Docket No. 194907).]

The Supreme Court denied defendant's application for leave to appeal from this Court's decision. *People v Hernandez-Orta*, 459 Mich 867 (1998). Defendant also filed a motion for relief from judgment in the trial court that was denied, and this Court denied the delayed application for leave because defendant failed to meet the burden of establishing entitlement to relief. *People v Hernandez-Orta*, unpublished order of the Court of Appeals, issued August 25, 1999 (Docket No. 217937). The Supreme Court denied defendant's application for leave to appeal. *People v Hernandez-Orta*, 461 Mich 1015 (2000).

On October 21, 2002, defendant filed a motion for release and for biological testing of evidence pursuant to MCL 770.16. On November 25, 2002, the trial court ruled on the motion as follows:

> With regard to the trial of this case, there was earlier in the proceedings a request by the Prosecutor to offer medical evidence that semen was found in the victim-complainant's vagina, and that the Defendant was among 58 percent of the population who could be the source of that. * * * And during the course of the first trial, that evidence being offered was considered.
>
> By the time we got to the second trial, it was clear that the Prosecutor could buttress its argument that there, in fact, had been a sexual encounter by offering semen found in the complainant's vagina without some showing more than 58 percent that the Defendant was the source; in other words, the evidence simply didn't tend, under [MRE] 401, to make any fact of consequence more or less likely; the 58 percent was way too high. * * *
>
> The point was that the court determined that the semen found in the complainant's vagina in this case wasn't relevant to the claim that the Defendant committed the offense, didn't tend to prove that he committed the offense. I think that is still the case, nor would test results showing that the semen wasn't the Defendant's tend to exonerate him. It's not admissible to prove he committed the offense based on the testing we have, and it's not admissible to prove even if it excluded him, that he didn't commit the offense, because the evidence was clear that there was concentual [sic] sexual relations two days prior to the occurrence.
>
> Now, could that be false? Yes.
>
> Could that testimony have been perjured? Yes.
>
> Did the jury consider all of that? Yes, at least with regard to the credibility of the complainant, clearly; so, that question has come and gone, and it seems clear to me that even today, if you offer me unquestioned DNA test results that show that [defendant] could not be the source of the semen found in the complainant's vagina, it wouldn't be material, and at a threshold level, it wouldn't

> be relevant, because it wouldn't tend to make any fact of consequence more or less likely.
>
> Now, that in contrast to the fingernail scrapings, I think, is a very different question, because the testimony, as I understand it, was that the complainant tried to scratch the Defendant during the event; whether she succeeded or not is something perhaps we couldn't ask her to tell us out at the sod farm in the middle of the night, but apparently the lab report indicates that there were cuttings taken, and below the cuttings, dirt and tissue.
>
> It seems to me clear that if that tissue found below the fingernails of the complainant at the time the kit was prepared that night is the tissue of the Defendant, that's powerful evidence, and if that tissue is of someone else, it seems to me that that is one aspect of an argument the Defendant should be entitled to make in support of the motion for new trial. It doesn't mean he gets a new trial. It doesn't mean he gets to have another jury look at this evidence, but it seems to me that given the statute and given the provision in the statute, even for clear and convincing evidence, that a sensible person would be persuaded that an analysis of that material found under those fingernails of the complainant on the night of the alleged occurrence, if not from the Defendant, is something that should be included in a delayed motion for new trial. It is relevant and is material, because, you see, the difference is if we were at trial with a jury, when you say, "Judge, here's negative results on the semen, the Defendant wants to admit it," I would say, "No, it's not admissible." "Judge, here's negative results on the tissue taken from the complainant's fingernails when she has testified that she attempted to scrape her assailant," I would say, "Yes, that is admissible." It seems to me the question really of materiality and admissibility co-exist.
>
> I will grant the motion regarding the fingernail scrapings and deny the motion as to the semen, and I will provide that as along as this is done at no cost to Clinton County, it be done at a laboratory designated by the [defendant's representatives].

It is important to note that defendant never appealed the trial court's decision to limit biological testing to fingernail tissue analysis and exclude DNA testing of any semen evidence.

Twenty-nine months later, on March 22, 2005, defendant filed another motion for biological testing. Although it was originally believed that there were fingernail scrapings available for analysis, it was learned that the sample had been consumed by prior testing or there was never an adequate amount available for DNA testing. For the first time in the lengthy history of the case, the defense asserted in the motion for biological testing that the criminal sexual conduct kit processing form revealed that the sperm found in the complainant's vagina could not have been deposited more than 8 to 10 hours from the time of the examination. Therefore, the only person who could have deposited the sperm was the perpetrator of the rape. However, the prosecutor disputed defendant's representation of the science involved and noted that the criminal sexual conduct kit processing form did not indicate that the sperm was motile at that time. The trial court denied the defense motion for biological testing, holding that the evidence regarding the motility of the sperm and the time frame of deposit was not factually

supported. The trial court denied the defense motion by written order entered April 27, 2005. Defendant then filed this delayed application for leave to appeal.

Defendant alleges that the trial court erred in denying his motion for biological testing. We disagree. Whether the law of the case doctrine applies presents a question of law that is subject to de novo review. *Ashker v Ford Motor Co*, 245 Mich App 9, 13; 627 NW2d 1 (2001). An appellate court's decision on a particular issue binds both the lower courts and other appellate panels in subsequent appeals of the case. *Grievance Administrator v Lopatin*, 462 Mich 235, 260; 612 NW2d 120 (2000). An exception to the application of the law of the case doctrine is invoked when there is a need for independent review of constitutional facts. *Locricchio v Evening News Ass'n*, 438 Mich 84, 109-110; 476 NW2d 112 (1991). Another exception is also present where there is an intervening change in the law. *Freeman v DEC Int'l Inc*, 212 Mich App 34, 38; 536 NW2d 815 (1995).

Review of the history of this case reveals that the trial court excluded the DNA evidence on relevancy grounds and that decision was upheld by a prior panel of this Court. The trial court premised its decision based on the victim's testimony that she engaged in consensual sexual relations before the rape and the trial court's conclusion, based on the medical information that evidence of such an encounter could remain within the victim for 72 hours. Consequently, the law of the case precludes admission of the DNA evidence to the extent that it conflicts with the previous appellate rulings.

Defendant ignores the prior procedural history regarding the exclusion of the DNA evidence and the prior decision by the trial court in 2002,[1] that denied the request for biological testing, and asserts that, by statute, he is entitled to the testing. MCL 770.16 governs DNA testing and provides in relevant part:

> (1) Notwithstanding the limitations of section 2 of this chapter, a defendant convicted of a felony at trial before January 8, 2001 who is serving a prison sentence for the felony conviction may petition the circuit court to order DNA testing of biological material identified during the investigation leading to his or her conviction, and for a new trial based on the results of that testing. The petition shall be filed not later than January 1, 2009.
>
> ***
>
> (3) The court shall order DNA testing if the defendant does all of the following:
>
> (a) Presents prima facie proof that the evidence sought to be tested is material to the issue of the convicted person's identity as the perpetrator of, or accomplice to, the crime that resulted in the conviction.
>
> (b) Establishes all of the following by clear and convincing evidence:

[1] Defendant did not appeal the ruling in 2002 that denied the request for additional DNA testing.

(i) A sample of identified biological material described in subsection (1) is available for DNA testing.

(ii) The identified biological material described in subsection (1) was not previously subjected to DNA testing or, if previously tested, will be subject to DNA testing technology that was not available when the defendant was convicted.

(iii) The identity of defendant as the perpetrator of the crime was at issue during his or her trial.

Statutory interpretation presents a question of law that we review de novo. *People v Nimeth*, 236 Mich App 616, 620; 601 NW2d 393 (1999). The function of a reviewing court resolving disputed interpretations of statutory language is to effectuate the legislative intent. *People v Valentin*, 457 Mich 1, 5; 577 NW2d 73 (1998). When the language of the statute is clear, the Legislature intended the meaning plainly expressed, and the statute must be enforced as written. *Id*. It is presumed that every word has some meaning, and a construction that would render part of the statute surplusage or nugatory must be avoided. *People v Borchard-Ruhland*, 460 Mich 278, 285; 597 NW2d 1 (1999). The fair and natural import of the terms of the statute, in view of the subject matter of the law, is what must govern. *People v Morey*, 461 Mich 325, 330; 603 NW2d 250 (1999).

In the present case, the trial court properly denied defendant's motion for further biological testing of the DNA evidence. Although defendant asserts that the conditions of MCL 770.16(3) were fulfilled, we need not address that provision where MCL 770.16(1) was not satisfied. MCL 770.16(1) provides that a defendant may petition the circuit court "to order DNA testing of biological material identified during the investigation *leading to his or her conviction*." (Emphasis added). In the present case, there was no biological material identified during the investigation of the case that led to defendant's conviction. The second trial during which defendant was convicted contained no information regarding DNA testing of biological material to lead to the conviction. Rather, the victim testified that she had seen defendant in the summer, but did not know his name. She heard others refer to defendant as "Fonzie." The victim accounted for the fact that DNA evidence found on her person may not belong to defendant in light of recent prior sexual acts. Because the available DNA testing at the time of the rape did not identify the victim's assailant with certainty and because of the possibility that the DNA may belong to someone other than the assailant in light of the victim's sexual history, the trial court completely excluded the DNA evidence from the second trial. The plain language of the statute at issue provides for later or further DNA testing where the DNA evidence in the investigation led to the conviction. *Valentin, supra*. That situation did not occur in the present case. Rather, this trial was premised on the credibility of the witnesses in light of the lack of scientifically certain evidence at that time.[2] Consequently, defendant failed to demonstrate entitlement to further DNA testing because of the posture of his trial.

[2] We also note that, assuming that the DNA evidence belonged to another individual, defendant could not satisfy MCL 770.16(7)(a). In light of the victim's admission to other sexual acts with another, there is no indication that defendant could demonstrate that "only the perpetrator of the

(continued…)

Affirmed.

/s/ Patrick M. Meter
/s/ Kirsten Frank Kelly
/s/ Karen M. Fort Hood

(…continued)

crime or crimes for which the defendant was convicted could be the source of the identified biological material." The criminal sexual conduct kit processing sheet and the information attached to the defense motion in the trial court does not clearly establish that the DNA found on the victim could only be left by the perpetrator.